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No. 80-1285

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - - Petitioner

versus

EARL J. HARTLAGE - - - - - Respondent

On Writ of Certiorari to the Court of Appeals of Kentucky

PETITIONER'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

(1)

Does Kentucky Revised Statute (KRS) 121.055, as interpreted by Kentucky Courts in voiding Petitioner's election for a campaign promise to serve as a public official for a salary which is less than permitted, violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendment to the Constitution of the United States upon grounds of vagueness and overbreadth?

(2)

Is there a clear and present danger of sufficient magnitude to a compelling state interest such as to warrant the censoring of political speech protected by the First and Fourteenth Amendment to the Constitution of the United States as to void Petitioner's election where Petitioner made a campaign promise to serve as a public official for less than permitted, which was retracted four (4) days later, some 78 days prior to the election?

(3)

Whether the Kentucky Courts, in the voiding of Petitioner's election for the making of a campaign promise to serve as a public official for a salary which is less than permitted, have interpreted KRS 121.055 in such a manner as to violate the guarantee of unencumbered political speech accorded by the First and Fourteenth Amendment to the Constitution of the United States, by creating artificial distinctions for different forms of political speech?

PARTIES

The names of all the parties to this proceeding are stated in the caption of the case in this Court as given above.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-1285

CARL W. BROWN - - - - - - *Petitioner*

v.

EARL J. HARTLAGE - - - - - *Respondent*

PETITIONER'S BRIEF ON THE MERITS

I. OPINIONS AND JUDGMENTS BELOW

The Order Denying Petitioner's Motion for Discretionary Review before the Supreme Court of Kentucky is not reported, J.A. 41, December 9, 1980.

Earlier opinions in the suit are also not reported, and are as follows:

- Findings of Fact, Conclusions of Law and Opinion, Jefferson Circuit Court, Jefferson County, Kentucky, on the merits, J.A. 18, February 6, 1980.
- Judgment of the Jefferson Circuit Court, Jefferson County, Kentucky, J.A. 27, February 12, 1980.
- Final Judgment and Opinion of the Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 29, August 8, 1980.
- Opinion and Order Denying Petition for Rehearing, Court of Appeals of Kentucky, Com-

monwealth of Kentucky, J.A. 38, October 29, 1980.

Proceedings in the case subsequent to the Order Denying Petitioner's Motion for Discretionary Review also not reported were as follows:

- Orders entering a Stay of Court of Appeals of Kentucky Mandate, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 42-43, December 10, 1980 and December 16, 1980.
- Order for Substitution of Counsel, Court of Appeals of Kentucky, Commonwealth of Kentucky, J.A. 44, December 16, 1980.

II. JURISDICTION

The Order denying Petitioner's Motion for Discretionary Review in the Supreme Court of Kentucky was entered December 9, 1980, and the *Petition for Certiorari* was filed in this Court on January 26, 1981 within the time allowed by the United States Code, Title 28, Section 2101(c). The judgment of the Court of Appeals of Kentucky, of which review and reversal is here sought is a final judgment within the meaning of the jurisdictional statute, 28 U.S.C., Section 1257(3).

III. CONSTITUTIONAL AMENDMENTS, AND STATUTES INVOLVED

Petitioner's claim in this suit before this Court is based upon the free speech guarantee of the First Amendment to the Constitution of the United States made applicable to the States by the Fourteenth Amendment to the United States Constitution. This

matter is bottomed upon the fact that Petitioner has been denied his rights under these constitutional guarantees by the Kentucky Court of Appeals' interpretation of Kentucky Revised Statute ("KRS") 121.055. In developing the arguments herein contained, the Petitioner shall also rely on KRS 67.040, KRS 67.083, KRS 64.527, KRS 64.528 and KRS 64.530, all of which are Kentucky statutes dealing with the duties, responsibilities and compensation of Fiscal Court Commissioners. All of said statutes are contained in a Statutory Appendix, ("S.A.") made a part of this Brief.

IV. STATEMENT OF THE CASE

This matter is a request for relief by Petitioner from the final judgment of the Court of Appeals of Kentucky ("Court of Appeals"), Kentucky's intermediate appellate court. The Petitioner requested review of the decision of the Court of Appeals, but the Kentucky Supreme Court refused Petitioner's Motion for Discretionary Review and thus allowed the decision of the Court of Appeals to become the law of this case.

The matter at bar involved an election contest filed by Earl J. Hartlage ("Respondent"), a defeated Democratic incumbent Commissioner of the Jefferson County, Kentucky Fiscal Court.[1] Respondent con-

[1]In Kentucky, the office of the County Commissioner is elective. KRS 67.040. S.A., p. 6. In Jefferson County, Kentucky there are three such Commissioners who with the County Judge/Executive form the legislative branch of County government. KRS 67.083. S.A., p. 7.

tested the election of his successful Republican challenger Carl W. Brown, ("Petitioner"). Petitioner defeated Respondent in the November 6, 1979 election by a plurality of 10,151 votes.

Suit was filed by Respondent in the Jefferson Circuit Court to void the election of Petitioner. J.A., 9. Respondent alleged that Petitioner, and Petitioner's running mate for the office of Jefferson County Commissioner, Dr. Bill Creech ("Creech"), had violated the Kentucky Corrupt Practices Act by making a public statement in violation of KRS 121.055. See S.A., 11. This was denied in Petitioner's Answer, and Federal constitutional issues were raised. J.A., 12.

Petitioner's and Creech's statement of August 15, 1979, made during a local press conference, criticized the substantial increase in the cost of operating the Jefferson County Commissioners' Office during Respondent's term of office. Petitioner and Creech noted that the Respondent had increased the County Commissioners' pay to $20,000 per year, and had created a position of Executive Assistant to all County Commissioners' at a cost of $34,000 per year. In criticizing this public expenditure, Creech stated:

> "We abhor the commissioners' outrageous salaries. And to prove the strength of our convictions one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the tax payers $36,000 during our first term of office, by $3,000 each per year." J.A., 2.

Petitioner affirmed the statement of Creech and also articulated a second proposal to cut the salaries of the County Commissioners' office staff:

> "These two proposals—cutting our own salaries and reorganizing the commissioners' office staff, will save the taxpayers over $172,000 during our term of office. We make these statements fully aware that the office that we intend to occupy should set the tone for the type of public officials we intend to be. Under our guidance, extravagance of public expense will be a thing of the past, and responsibility and integrity will be our watch words, Progress through Cooperation our theme." J.A., 3.

Four days later, on August 19, 1979, these statements were fully retracted by Petitioner and Creech at a joint press conference. In retraction Petitioner and Creech jointly stated:

> "Last week, we pledged to reduce the Commissioners' salaries because we are committed to responsible government spending, and because we abhor the greed displayed by Hartlage's doubling of his own salary soon after taking office. And now, to our surprise and dismay, we find that, at least in some instances, attempts at good government may not be legal. We are men enough to admit when we have made a mistake. We have discovered that there are Kentucky Court decisions and Attorney General Opinions which indicate that our pledge to reduce our salaries if elected may be illegal. . . .
>
> However, being law abiding citizens and being pledged to enforcing all laws, we do hereby for-

mally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly to correct this silly provision of state law." J.A., 4-5.

On November 6, 1979, the election for the Jefferson County Commissioners' office was held and Petitioner defeated Respondent as noted, by 10,151 votes. (J.A., 7). Creech, who had made the same statements as Petitioner, *was defeated.*

• Proceedings in the Trial Court

On December 4, 1979, Respondent filed a Petition to void the election of the Petitioner based solely on the statement of August 15, 1979. J.A., 9. The Answer of Petitioner denied all of the substantive allegations as to the effect of Petitioner's statement being a violation of KRS 121.055 and raised constitutional defenses of free speech pursuant to the First and Fourteenth Amendments to the Constitution of the United States. J.A., 12.

This action was tried before the Jefferson Circuit Court, without a jury, on January 29 and 30 of 1980. The trial court found, inter alia, that after the retraction of August 19, 1979, until the election on November 6, 1979 Petitioner never again stated that he would reduce his salary as a Jefferson County Commissioner. The trial court noted that during the remainder of the campaign, Respondent directly questioned Petitioner as to the salarly reduction statements and Petitioner repeated his retraction of August 19, 1979. J.A., 18.

The trial court upon reviewing the whole record, found that based upon:

> ". . . (1) the almost immediate retraction by Brown; (2) no subsequent retreat by Brown from the retraction; (3) balancing the violation against the disenfranchisement of thousands of votes; (4) the presumption of the will of the people on the election process; and (5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county wide election; . . . Brown was fairly elected." J.A., 25.

The trial court in reliance upon *Sparks* v. *Boggs*, Ky., 339 S. W. 2d 480 (1960), did find a violation of KRS 121.055 and held that Petitioner's statement was an unlawful promise to the electorate; but, despite the rationale of *Sparks*, as noted above, it held that Petitioner was fairly elected. Court costs were assessed against Petitioner. The Circuit Court also found that Respondent had himself violated at least one provision of the Kentucky Corrupt Practices Act, but held this violation de minimus. J.A., 18.

• Opinion and Judgment of the Court of Appeals of Kentucky

Respondent appealed to the Court of Appeals which reversed the Circuit Court, holding that the election should be voided pursuant to KRS 121.055 as interpreted by *Sparks, supra.* The Court of Appeals dismissed Petitioner's cross-appeal predicated on the violation of the Kentucky Corrupt Practices Act by Respondent due to Petitioner's failure to post a super-

sedeas bond to cover the costs assessed against him below. This Judgment and Opinion by the Court of Appeals was issued on August 8, 1980, J.A., 29.

• Opinion of the Court of Appeals of Kentucky on Petition for Rehearing

On October 29, 1980, the Court of Appeals of Kentucky denied Petitioner's Petition for Rehearing.

In this opinion the Court of Appeals questioned its own decision as to whether or not KRS 121.055 as interpreted by the holding in *Sparks, supra,* was unconstitutionally broad:

> "What appellee really argues is that the holding of *Sparks* v. *Boggs, supra,* is unconstitutionally broad for the reason that a holding in 1980 that a promise to serve in office at reduced pay can be equated with vote buying is an unconstitutional limitation on the freedom of speech. If carried to its logical extreme, he contends, any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes. This contention is not without logic or appeal, but since it strikes at the heart of *Sparks* v. *Boggs, supra,* it must be addressed to a Court which has the power to overturn or modify that decision." J.A., 39-40.

Having been denied his Petition for Rehearing, the Petitioner then moved to the next forum, the Supreme Court of Kentucky.

• Further Proceedings

On November 18, 1980, Petitioner filed a Motion for Discretionary Review of the Court of Appeals deci-

sion with the Kentucky Supreme Court. On December 9, 1980, the Kentucky Supreme Court denied this Motion. J.A., 41.

On December 10, 1980, the Court of Appeals, pursuant to Petitioner's request, granted a one week stay of its mandate voiding the Petitioner's election, J.A., 42, and on December 16, 1980 granted an additional Stay until March 9, 1981, so that Petitioner could seek relief from this Court. On December 16, 1980, the Court of Appeals granted Petitioner's Motion for Substitution of Counsel. J.A., 44.

On February 13, 1981, Petitioner filed an Application for Stay with this Court, requesting a Stay of the Court of Appeals mandate until such time as this Court denied Petitioner's Writ of Certiorari or until such time as the mandate of this Court shall issue. On February 18, 1981, Associate Justice Potter Stewart entered the requested Stay Order. J.A., 45.

On March 30, 1981, Petitioner received notice that the Petition for Writ of Certiorari had been granted by this Court.

V. SUMMARY OF ARGUMENT

I.

The Court of Appeals of Kentucky in its decision totally ignored this Court's prior decisions regarding the protection afforded political expression under the First Amendment. Beyond doubt, Petitioner's statement to serve for less than permitted, which was found

to be violative of KRS 121.055, is political expression. This Court in *Mills* v. *Alabama,* 384 U. S. 214 (1966); *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *First National Bank of Boston* v. *Bellotti,* 435 U. S. 765 (1978); and *Monitor Patriot Co.* v. *Roy,* 401 U. S. 265 (1971) has held that one of the major purposes of the First Amendment right of free speech is to afford the free discussion of political and governmental affairs. This of course includes the manner in which government is operated. Certainly the statement of Petitioner to lower his salary if elected is a direct comment on governmental affairs and thus is protected speech.

II.

Petitioner's election was voided by the Kentucky Courts for alleged violation of KRS 121.055 which in pertinent part states:

> "No candidate . . . shall promise . . . things of value . . . to any person . . . in consideration of a person's vote." S.A., 11.

The Court of Appeals relied heavily upon *Sparks, supra,* in making its determination that Petitioner's statement that he would serve for less than permitted was a violation of KRS 121.055. Petitioner asserts that KRS 121.055 warns of nothing. There is no self-contained means in the statute by which a reader of common intelligence could judge its impact.

The only statute dealing with the payment to be received by County Commissioners as a fixed mandatory sum, is KRS 64.530. S.A., 3. This statute

requires a mandatory fixed compensation rate of $9,600 per year. Therefore a statement to serve for $3,000 less than the $20,000 sum currently being paid to County Commissioners would by common sense not be a salary lower than statutorily mandated. This Court, in civil and criminal matters, has consistently held that a statute which mandates or prohibits action in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the essentials of due process. *Connally* v. *General Constr. Co.,* 269 U. S. 385, 391 (1926). This Court has also ruled that this danger of vagueness is magnified when its impact is upon political speech. *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961) and *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967). KRS 121.055 as interpreted by the Court of Appeals pursuant to the *Sparks* rationale must be determined to be constitutionally infirm under the doctrine of vagueness.

III.

This Court has upheld challenges to state statutes regulating the First Amendment right of free speech where the state statute goes beyond the necessary governmental purpose to control or prevent activities which may not be subject to state regulation. See *Gooding* v. *Wilson,* 405 U. S. 518 (1972). In these cases, this Court holds that a state may not regulate in the First Amendment area with such an unnecessarily broad sweep as to invade the area of freedom protected

by it. *Keyishian* v. *Board of Regents of New York, supra.*

In reviewing state court decisions dealing with overbroad regulation, this Court has traditionally mandated that the state appellate court be allowed to interpret state statutes prior to this Court's intervention. See *United States* v. *Thirty-Seven Photographs,* 402 U. S. 363 (1971). In the matter at bar, the Court of Appeals *has* interpreted KRS 121.055. Its interpretation directly infringes upon the fundamental First Amendment rights of the Petitioner. The statement to serve for less than permitted has now been interpreted by the Court of Appeals as an offer to reduce taxes pro tanto. This falls squarely within protected First Amendment speech. Accordingly, the Court of Appeals interprets this statute in an overbroad manner infringing upon the right of free unencumbered political speech as exercised by Petitioner in that it cannot be reasonably held that a state's interest in protecting the electorate from bribes, is served by a statute which makes it illegal to promise to reduce taxes.

IV.

Assuming, arguendo, that Petitioner's statement was unlawful at the time it was made on August 15, 1979, the Court of Appeals has still erred by disregarding this Court's teachings as to the balancing of such protected political speech against the compelling state interest. This test is commonly known as the Clear and Present Danger Test. The test has been used in

numerous instances to protect First Amendment rights. *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), *Monitor Patriot Co.* v. *Roy, supra, Communist Party of Indiana* v. *Whitcomb,* 414 U. S. 441 (1974), *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). In practical application the Court mandates that the state court discern whether actual facts exist which present a clear and present danger to the state's compelling interest. *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978). Here, Petitioner's alleged illegal statement was made on August 15, 1979 and a retraction made on August 19, 1979, 78 days prior to the election of November 6, 1979. The election resulted in a plurality of 10,151 votes for the Petitioner and a defeat for his running mate, Creech, who had made the same statements. The trial court agreed with Petitioner's view and declared although a violation of the statute had occurred Petitioner was validly elected. The trial court's finding of fact and conclusions of law show that there was no clear and present danger to the state's compelling interest of protecting the election process. The Court of Appeals in reversing the trial court's holding refused to consider the retraction or defeat of Creech as evidence by assuming that KRS 121.055 required a strict mandatory construction. This reasoning is in total contravention of this Court's mandate regarding the clear and present danger test and is error.

V.

KRS 121.055 literally read prohibits any candidate from making any promise, either directly or indirectly,

in consideration for the vote of the general populous. The Court of Appeals interpreted Petitioner's statement to reduce his salary to less than permitted, as an offer to the general populous to reduce taxes pro tanto. Presumably, such an interpretation would prevent any promise by any candidate, to curtail government spending or seek other economies in government.

Kentucky is no different than the remaining states of the Union; its political process is viable and active. They involve contests in which normal political promises are made to the electorate in consideration for their votes. Here the Court of Appeals now holds that a promise to serve for less than is permitted is unacceptable whereas promises to provide for increased services, encourage business, or good administrative services are acceptable. By its decision in this matter, Kentucky has now established two standards of political speech based upon the content of the campaign promise.

This Court has condemned this type of artificial distinction as to legality of political speech based upon subject matter. *Police Department of Chicago* v. *Mosely,* 408 U. S. 92 (1972), *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953) and *Niemotko* v. *Maryland,* 340 U. S. 268 (1951).

Implicit in the interpretation of KRS 121.055 by the Court of Appeals is that only candidates may not make promises to the electorate. There is no prohibition against citizens, citizens groups, or other organizations who may or may not advocate the same ideas as candidates. Thus, while a candidate in Kentucky may

not be privileged to address the ideas advocated by any of the citizens groups under KRS 121.055, non-candidates who are not bound by the statutory language of KRS 121.055 may address the same ideas with impunity. This is a distinction based upon the status of the speaker. This Court in *First National Bank of Boston* v. *Bellotti, supra,* held this type of distinction unconstitutional. Proscription, either by statute or court interpretation, which infringes upon the First Amendment right of free political speech based upon the speaker is constitutionally infirm. Here the Court of Appeals by its interpretation has made such a distinction.

VI. ARGUMENT

I. The Decision Below by The Court of Appeals of Kentucky Interpreting KRS 121.055 Is Not In Accord With Previous First Amendment Decisions of This Court.

A. Political Speech Is a Fundamental First Amendment Right.

This Court has held on numerous occasions, that the very core of the First Amendment right of freedom of speech, is intended to protect political expression addressing governmental affairs.

> "Whatever difference may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such mat-

> ters relating to political processes." *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966).

See also *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), and *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265 (1971).

Here, Petitioner's statement to serve for less than permitted was made as political commentary upon the incumbent Respondent's voting in favor of an ordinance wherein the salary of the Respondent in his capacity as County Commissioner was substantially increased. The clear impact of the statement was to contrast one candidate's view of the manner in which government officials should be paid with the view of his opposition. These comparisons are clearly within the ambit of appropriate discussion by candidates and public revelation of their concepts as to the way government is operated or should be operated.

In *Buckley* v. *Valeo*, 424 U. S. 1 (1976) this Court observed:

> "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of this system of government established by our Constitution." p. 14.

It cannot be gainsayed that this constitutional guarantee has its fullest and most urgent application upon a campaign for political office such as that in which Petitioner was engaged. Thus, having established that Petitioner's statements are entitled to First Amendment protection, we must now examine the posture taken by the Court of Appeals to determine if there was a denial of such protection.

* * * * * * *

The Court of Appeals in its decision did not heed the constitutional argument based upon the First Amendment espoused by Petitioner. The Court in its decision (J.A., 29) totally ignored this Court's recent decisions upon the subject although in its opinion rendered upon the Petition for Rehearing it may have desired to change its ruling, it nonetheless felt bound by the prior precedent of *Sparks* v. *Boggs, supra.* In this opinion, the Court of Appeals although not changing its former ruling, did thoughtfully reflect that the Petitioner's arguments under the First Amendment were not without "logic and appeal." However, neither the Court of Appeals nor the Supreme Court of Kentucky has seen fit to unchain Petitioner's First Amendment right from the *Sparks* interpretation given KRS 121.055.

• • • • • • • •

This Court has carved out five (5) basic areas in which litigants may defend their First Amendment rights: (1) vagueness, *Keyishian* v. *Board of Regents,* 385 U. S. 589 (1967); (2) overbreadth, *Gooding* v. *Wilson,* 405 U. S. 518 (1972); (3) failure by statutes and interpretations of statutes to substantiate a compelling state interest in accord with the "clear and present danger standard," *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978); (4) statutes and interpretations of statutes creating unallowable distinctions between forms of political expression based upon the content of speech, *Police Department of Chicago* v. *Mosely,* 408 U. S. 92 (1972); and (5) unal-

lowable distinctions between forms of political expression based upon the speaker, *First National Bank of Boston* v. *Bellotti, supra.* The present case contains all five unallowable infringements upon Petitioner's First Amendment right to conduct a viable campaign.

II. The Court of Appeals of Kentucky's Interpretation and Application of KRS 121.055 Is Void Based Upon Constitutional Grounds of Vagueness.

A. This Court's Pronouncements Upon the Vagueness Doctrine

This Court has consistently stated in both civil and criminal matters, that a statute which mandates or prohibits action in terms so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the essentials of due process. *Connally* v. *General Constr. Co.,* 269 U. S. 385, 391 (1926).

This Court has especially warned of the danger of vagueness when its impact is upon political speech entitled to First Amendment protection. In *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961) it is taught:

> "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit punishment for the fair use of this

> opportunity is repugnant to the guarantee of liberty contained in the Fourteenth Amendment." (pp. 287, 288).

In practical application, this Court requires that state courts be given an opportunity to interpret their own statutes prior to its accepting an attack upon grounds of constitutional vagueness. Here, the Court of Appeals has interpreted KRS 121.055, but the interpretation only increases the uncertainty surrounding the statute. This Court holds that where a state statute, as interpreted by the state court, creates the chilling effect of threatened sanctions upon the exercise of such First Amendment right the standards of permissible statutory vagueness are to be strictly applied. In short, precision of regulation giving notice to the speaker, who wishes to exercise the right is the touchstone. Without such notice the threat of such sanctions deter the exercise of vital First Amendment rights. *Keyishian* v. *Board of Regents of New York,* 385 U. S. 589 (1967); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); and *Ashton* v. *Kentucky,* 384 U. S. 195 (1966).

B. The Court of Appeals of Kentucky's Interpretation of KRS 121.055 is Impermissibly Vague.

In the matter at Bar the Court of Appeals voided the election of Petitioner based upon an alleged violation of KRS 121.055. The Kentucky Court relied upon *Sparks* v. *Boggs, supra.* In *Sparks,* it was held that a promise, by a candidate for the office of City Commissioner whose salary was fixed by statute violated the

Kentucky Corrupt Practices Act, KRS 123.040.[2] In likening *Sparks* to the matter at bar, the Court of Appeals held that Petitioner's salary was fixed by law, and therefore he could not legally reduce his salary. Accordingly, his statement to do so was an unlawful promise to the taxpayers to "reduce pro tanto the amount of taxes each taxpayer must pay." J.A., at p. 33. In reaching this decision, we assume the Kentucky Court must have parsed the statute to read:

> "No candidate . . . shall promise . . . things of value . . . to any person . . . in consideration of a person's vote."

We submit that the language of the statute warns of nothing. There is no self contained means in the statute by which the Petitioner could judge its impact. It leaves a candidate, such as Petitioner, in a position to either act at risk, or not act at all and be deprived of constitutional rights. This is the type of vagueness that this Court has struck down on previous occasions. *See Ashton* v. *Kentucky, supra* and *Baggett* v. *Bullitt, supra.*

The Court of Appeals did not address the issue of statutory clarity in its opinion. Instead it relied upon the precedent of *Sparks, supra,* as giving notice to the Petitioner that this form of political expression has been held to be a violation of a statute similar to KRS 121.055, despite the fact that *Sparks* was decided fourteen years prior to the adoption of the current statute

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[2]KRS 123.040 is now repealed. Its successor statute was held to be KRS 121.055.

and was factually different from the matter at hand. In *Sparks,* the offending office seekers offered to serve for $1 per year. The remaining part of their salary was offered to select groups in the community rather than to apply the savings to the general fund for the benefit of all tax payers, as was done by Petitioner.

Sparks is equally inapplicable in that under the then controlling salary limitation statute, each commissioner was to receive an annual salary of *not more than $500.* Obviously, the offending parties in *Sparks* were on notice of the fact that to serve for $1 per year was less than the $500 statutory sum. In the matter at hand, the Petitioner stated that he would serve for $3,000.00 less than the permitted $20,000 salary. In effect, the Petitioner stated that he would serve for $17,000 per year rather than $20,000. The Court of Appeals ignored KRS 64.530(6) which is the only statute explicity controlling the salary a County Commissioner may receive. KRS 64.530(6) provides that compensation of County Commissioners serving on fiscal courts in counties containing a city of the first class[3] shall not exceed $9,600 per year. Obviously, the Petitioner's statement to serve for $17,000 per year is not a statement that he would serve for less than the statutory figure of $9,600 per year. Yet the Court of Appeals assumed that the official salary was $20,000. Such analysis takes into effect what is commonly referred to in the Commonwealth of Kentucky as the "rubber dollar" theory. Pursuant to KRS 64.528, the

[3]The situs of the City of Louisville is Jefferson County. Louisville is a city of the first class.

fiscal court of any county in the Commonwealth *may* elect, in accord with the present value and purchasing power of the dollar, to adjust certain official's compensation and thus adjust present salaries for inflationary erosion. The mechanics for such adjustment, in so far as here relevant, is an administrative determination and advice to the appropriate governing body which *may* then set the annual compensation of elected officials such as county commissioners. The difference between $9,600 as statutorily required by KRS 64.528 and the $20,000 sum which the office of County Commissioner was receiving at the time of Petitioner's statement is, in effect, inflated dollars. Petitioner's statement merely reflected that he would serve for 3,000 deflated dollars less than was permited; but, unlike the facts in *Sparks,* Petitioner made no reference to a willingness to serve for less than the statutory sum of $9,600.

Clearly, even if the Petitioner was aware of the *Sparks* rationale, he would only be apprised of the fact that it would not be permissible to offer to serve for less than the $9,600 provided by KRS 64.530(6). Thus neither *Sparks* nor KRS 121.055 would caution the Petitioner of a possible violation of law. Surely, he could have felt secure in the knowledge that he did not promise to serve for less than the $9,600 statutory sum. Common intelligence would dictate that there was no correlation between the unlawful conduct complained of in *Sparks,* and the alleged unlawful conduct of the Petitioner.

Certainly, as this Court noted in *Keyishian* v. *Board of Regents of New York, supra,* at p. 604, the danger of the chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform what is being proscribed. Here, the interpretation by the Court of Appeals gives no indication to Petitioner that his campaign statement was unlawful. It must follow then, that this statute as interpreted by the Court of Appeals is impermissibly vague.

III. The Kentucky Court's Interpretation and Application of KRS 121.055 Is Violative of Constitutional Principles of Overbreadth.

A. This Court's Prior Precedent Regarding Overbreadth and the First Amendment.

As a general principle of constitutional interpretation where "legislation is unconstitutionally broad as to be susceptible of application to conduct that is protected by the First Amendment", such legislation may be successfully attacked. See *Gooding* v. *Wilson,* 405 U. S. 518 (1972); *Plummer* v. *Columbus,* 414 U. S. 2 (1973); *NAACP* v. *Button,* 371 U. S. 415 (1963). This Court teaches that a statute regulating speech must be carefully drawn or authoritatively construed to reach only unprotected speech and not be susceptible of application to protected expression. Standing to allege overbreadth does not depend upon the infringement of Petitioner's First Amendment rights but the objectionable quality is found in the potential application of the statute to other protected areas of free speech.

See *Keyishian* v. *Board of Regents, supra,* and *NAACP* v. *Button, supra.*

The present controversy involves violation of First Amendment rights to carry on a political campaign. It affects both the rights of the Petitioner and other candidates in the Commonwealth of Kentucky who must now refrain from engaging in active political discussion due to the overbroad interpretation and the hazard of loss created by the Court of Appeals by its interpretation of KRS 121.055.

B. The Court of Appeals of Kentucky Has Interpreted KRS 121.055 in a Manner Which Is Impermissibly Overbroad.

The Court of Appeals of Kentucky has held that the statement of Petitioner to serve for less than permitted was in effect an offer to reduce taxes pro tanto. Clearly, a campaign promise to reduce taxes is the exact form of candidate promise which the First Amendment protects. *Mills* v. *Alabama, supra.* Although we do not take issue with the right of the Commonwealth of Kentucky to protect the electoral process from corruption, it is contended that a public statement to reduce one's salary and thus reduce taxes pro tanto is not inimical to the electoral process. To the contrary, it is illustrative of the type of good wrought by open competition for public office and is a protected right. Yet, the Court of Appeals has gone beyond what is required to protect the electoral process from corrupt practices and entered the area protected by the First Amendment. It has in effect ruled that KRS 121.055 can be used to prevent a candidate from discussing one of the real issues

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of government — the salary received by the candidate, if elected.

Perhaps more important is that this decision by the Court of Appeals will effect candidates running for office in the Commonwealth of Kentucky *far* into the future. It may well be rhetorical to ask: If the Court of Appeals can void Petitioner's election for discussing in public forum the salary to be accepted by the candidate if elected, then what matters are left open for such discussion? If salary discussions are to be regarded as unlawful, then is it not equally likely that a promise to bring more jobs, or a promise to better the plight of the elderly, or any dedication expressed by a candidate toward betterment of the common good are also violations?

We submit that the distinction drawn by the Court of Appeals by this interpretation of KRS 121.055 infringes directly upon allowable political speech and creates an unacceptable chilling effect upon the First Amendment rights of candidates for political office. Clearly, under the Court's prior precedent the doctrine of overbreadth is applicable, and the judgment of the Court of Appeals is erroneous.

IV. The Court of Appeals of Kentucky Has Not Applied the Clear and Present Danger Test Mandated by This Court.

A. In Areas of Restraint on Political Speech, This Court Mandates a Balancing of Compelling State Interest Against the Clear and Present Danger to Such Interest.

This Court has often spoken on matters dealing with the advocacy of potentially unlawful activity by means

of speech and conduct. The Court has held on numerous occasions that more than mere advocacy of potentially unlawful conduct is required before a state court may restrain fundamental First Amendment rights. The threshold for such restraint upon First Amendment rights is a Clear and Present Danger to a compelling state interest.

The Court requires that the state make an affirmative showing that there is a clear and present danger to the state's compelling interest in the area which the state seeks to regulate. This formula for the protection of delicate interests has been applied in such cases as labor organization efforts, *Thornhill* v. *Alabama,* 310 U. S. 88 (1940) and *Thomas* v. *Collins,* 323 U. S. 516 (1945); in cases where individuals have advocated the violent overthrow of the government, *Herndon* v. *Lowry,* 301 U. S. 242 (1937) and *Communist Party of Indiana* v. *Whitcomb,* 414 U. S. 441 (1974); and, in various civil rights demonstrations, *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) and *Wood* v. *Georgia,* 370 U. S. 375 (1962). The expressions in each of these matters were uttered by litigants and were, in effect, political commentary of the day not unlike the utterances of the Petitioner here.

In practical application, a state court is required to inquire whether actual facts exist which present a clear and present danger to the state interest alleged. A court may not accept at face a legislative "finding" such as is contained in the statute at bar, and impose what in essence is "strict liability" for speech protected

by the First Amendment. The state court is required to find from the facts adduced that the speech sought to be proscribed presents an imminent danger to the state's compelling interest.

In *Landmark Communications, Inc.* v. *Virginia,* 435 U. S. 829 (1978) this Court enunciates the judicial function and delineates that function from the legislative function thusly:

> "A legislature appropriately inquires into and may declare the reasons in compelling legislative actions but the judicial function commands analysis of whether the specific conduct charged revolves within the reach of the statute and if so whether the legislation is consistent with the constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified." p. 844.

As this case aptly illustrates, this Court requires that a state court not impose *ipse dixit* liability upon speech which may advocate potential unlawful action. See also *Bridges* v. *California,* 314 U. S. 252 (1941) and *Whitney* v. *California,* 274 U. S. 357 (1927). In the matter at bar Kentucky ignores the balancing of rights; instead it imposes a vicarious sanction without more.

B. The Petitioner's Retraction of His Statement Some 78 Days Prior to the Election, and the Defeat of His Running Mate, Creech, Show That There Was No Clear and Present Danger to the Integrity of the Electoral Process.

On August 15, 1979, the Petitioner made his alleged unlawful statement. On August 19, 1979 through the

same forum Petitioner retracted his statement. This was some 78 days prior to the election. In the election the Petitioner defeated the Respondent by a plurality of 10,151 votes. Creech, Petitioner's running mate who had made the same statement, was defeated.

At both the trial of this action and upon appeal, the Petitioner argued that even if his statement was technically illegal under KRS 121.055, it was retracted within such time as to have no effect on the election process. The Court of Appeals refused to even consider this evidence:

> "The other considerations of the trial court likewise have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of the state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practices Act." (J.A., 35).

This finding by the Court of Appeals is exactly the kind of judicial abdication this Court has found unacceptable in previous clear and present danger standard decisions.

In contrast the Finding of Facts by the Jefferson Circuit Court clearly show that no clear and present danger to the electoral process existed. The trial court found:

"Further, upon reviewing the whole record, considering the following: (1) the almost immediate retraction by Brown; (2) no subsequent retreat by Brown from the retraction; (3) balancing the violation against disenfranchisement of thousands of votes; (4) the presumption of the will of the people on the election process; and (5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county wide election; the court adjudges . . . , that Brown was fairly elected." (J.A., at p. 25).

The Court of Appeals ignored these findings of fact and applied its mandatory, strict liability standard. Beyond cavil, the clearly established precedent enunciated by this Court has been disregarded. Accordingly, the judgment of the Court of Appeals is in error.

V. The Kentucky Court of Appeals has Interpreted KRS 121.055 in a Manner Not Consistent With This Court's Prior Decisions Regarding Artificial Distinctions of Legality for Different Forms of Political Speech Based Upon Speech Content.

A. This Court's Prior Decisions

This Court has often warned against statutes which factually or by interpretation create an artificial distinction of legality based upon the subject matter of the speech to be regulated. The case of *Police Department of the City of Chicago* v. *Mosely*, 408 U. S. 92, 96 (1972), is most apt. There the City of Chicago by ordinance attempted to restrict picketing in front of schools for any purpose other than labor disputes. In rejecting the ordinance as unconstitutional, under the

equal protection clause of the First and Fourteenth Amendments, this Court held:

> "Necessarily, then, under the equal protection clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored and more controversial view. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status' in the field of ideas, and government must afford all point of view an equal opportunity to be heard." p. 96.

See also *Niemotko* v. *Maryland,* 340 U. S. 268 (1951); *Fowler* v. *Rhode Island,* 345 U. S. 67 (1953); and *Carey* v. *Brown,* —— U. S. ——, 65 L. Ed. 2d 263, —— S. Ct. —— (1980). In application to the present controversy, the Court of Appeals has created an artificial distinction between various political campaign promises. It has again ignored the carefully defined precedents of this Court which prohibit such *artificial* distinctions.

B. The Court of Appeals of Kentucky Has Interpreted KRS 121.055 to Allow Some Forms of Expression of Political Speech But Not Others.

The Court of Appeals has interpreted Petitioner's Statements to serve for less than is permitted, as essentially an offer to reduce the taxes of the populous pro tanto. (J.A., 29). The logical extension of such reasoning is that any promise by a candidate to the

general electorate is a violation of KRS 121.055. The restrictiveness of this ruling is self evident. Presumably, this interpretation of KRS 121.055 would prevent any promise by any candidate not only to reduce taxes, but even such promises which relate to reducing waste in government or like economies all of which have the potential effect of reduction of taxes for citizens of the state. Indeed, a literal interpretation of the statute such as has been used by the Court of Appeals requires that no candidate for political office in the Commonwealth of Kentucky make any promise whatsoever as to any political change his election to public office may bring the electorate.

Kentucky is not unlike its sister states. Fiercely contested elections are the rule, not the exception. Normal political promises by candidates are made. The Court of Appeals has not voided the elections of other candidates based upon campaign promises to the electorate to produce greater efficiencies in government. These promises too, may effect the taxes payable by the citizens of the Commonwealth. However, the Court of Appeals has now stated that this form of political promise — a promise to serve for less than is permitted — is an unacceptable promise. However, general promises to provide good administrative service, to encourage business to locate in the Commonwealth of Kentucky, to provide new jobs and other political promises of common betterment are presumably acceptable. In practical application, by this ruling, the Court of Appeals has established two standards of political speech regarding campaign promises based purely upon

content. This is an unacceptable distinction based upon this Court's prior decisions.

VI. The Court of Appeals' Interpretation of KRS 121.055 Creates an Artificial Distinction as to the Legality of Different Forms of Political Speech Based Upon the Speaker.

A. This Court's Prior Decisions Regarding Distinctions Based on the Speaker.

This Court has recently addressed the issue of whether or not a state statute as interpreted by a state court may prohibit certain forms of political speech based upon the identity of the speaker. In the case of *First National Bank of Boston* v. *Bellotti, supra,* and again in the case of *Consolidated Edison* v. *Public Service Commission,* —— U. S. ——, 65 L. Ed. 2d 319, —— S. Ct. —— (1980) this Court has recognized this unallowable distinction by state courts. In *First National Bank of Boston* v. *Bellotti, supra,* the court addressed the issue of whether or not a state statute which prohibited expenditures by banks for purposes of influencing the vote on a referendum was constitutional. In holding that such a statute infringed upon First Amendment rights based upon the speaker, the Court announced:

> "If the speakers were not corporations, no one would suggest that the state court silence their proposed speech. It is the type of speech indispensible to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of speech in terms of its capacity for

> informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." *Id.* at 777.

This principal was reiterated in *Consolidated Edison, supra,* where once again a state's efforts to prevent a public utility corporation from exercising its First Amendment rights was disallowed.

B. The Court of Appeals of Kentucky Has Interpreted KRS 121.055 to Restrict Expression of Political Speech Based upon the Speaker.

The Court of Appeals in its interpretation of KRS 121.055, has impliedly stated that *only candidates may not make promises to the electorate* in consideration for their votes. This is the literal requirement of KRS 121.055 as interpreted. There is no statutory prohibition contained in KRS 121.055 directed to citizens groups, or others who are not candidates who may advocate the same concept as Petitioner. In interpreting Petitioner's statement as an offer to reduce taxes pro tanto, the Court of Appeals impliedly states that a candidate may not offer to reduce taxes, whereas citizens and citizens groups not laboring under such ban may do so . . . thus a distinction based upon the status of the speaker.

Indeed, this is the type of artificial distinction based upon the speaker which this Court has itself prohibited. Although it is conceded the state has a substantial interest in protecting the electorate, the proselytization by various special interest groups for a reduction of taxes, can be of no less danger than the statement of a

Candidate who offers to serve for less than the allowed sum and its illusory effect upon the same electorate's tax rates. Clearly, the Court of Appeals would not deign to forbid all political discussion in this area. However, in accordance with decisions of this Court, if a subject is a valid subject for discussion by one then it must be a valid subject for discussion by all. The holding of the Court of Appeals is thus a distinction as to the source of the political statement, and is an inappropriate circumscription of fundamental First Amendment rights.

VII. CONCLUSION

For each and all of the foregoing reasons the judgment of the Court of Appeals of Kentucky should be reversed, and the mandate of this Court should issue directing that Petitioner's election is valid.

Respectfully submitted,

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STATUTORY APPENDIX

§ 1257. State Courts; Appeal; Certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

* * * * * * * *

64.527. Annual computation of consumer price index for determination of rate of adjustment of compensation of elected county officials.—In order to equate the compensation of county judges/executive, county clerks, sheriffs, justices of the peace, county commissioners, coroners and jailers with the purchasing power to the dollar, the executive department for finance and administration shall compute by the second Friday in February of every year the annual increase or decrease in the consumer price index of the preceding year by using 1949 as the base year in accordance with section 246 of the Constitution of Kentucky which provides that the above elected officials shall be

paid at a rate no greater than seven thousand two hundred dollars ($7,200) per annum. The executive department for finance and administration shall notify the appropriate governing bodies charged by law to fix the compensation of the above elected officials of the annual rate of compensation to which the elected officials are entitled pursuant to the increase or decrease in the consumer price index. Upon notification from the executive department for finance and administration, the appropriate governing body may set the annual compensation of the above elected officials at a rate no greater than that stipulated by the executive department for finance and administration. (Enact. Acts 1974, ch. 254, § 1; 1976, ch. 283, § 1; 1976 (Ex. Sess.), ch. 14, § 38; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1976 (Ex. Sess.), ch. 17, § 19, effective January 1, 1978; 1978 ch. 384, § 582, effective June 17, 1978.)

* * * * * * * *

64.528. Compensation of specified officials adjusted to current purchasing power of the dollar.—In order to equate the current rate of compensation of commonwealth's attorneys, county clerks, county judges/executive, county attorneys, sheriffs, jailers, justices of the peace, and commissioners with the present value and purchasing power of the dollar, the court required by law to fix the compensation of the officials named in this section may, on or before September 1, 1974, adjust said officials' compensation within the limits set forth in Acts 1974, chapter 254 and may provide that said officials be entitled to the maximum amount of compensation for the entire 1974 calendar year. (Enact. Acts 1974, ch. 254, § 7; 1976 (Ex. Sess.), ch. 14, § 39; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1976; 1978, ch. 384, § 130, effective June 17, 1978.)

* * * * * * * *

64.530. Compensation of county officers and employes, and members of fiscal court.—(1) Except as provided in subsections (5) and (6) of this section, the fiscal court of each county shall fix the compensation of every county officer and employe except the officers named in KRS 64.-535 and the county attorney. The fiscal court may provide a salary for the county attorney.

(2) For the purposes of this section, justices of the peace and constables in all counties shall be deemed to be county officers and deputies or assistants of county officers shall be deemed to be county employes, but employes of county boards or commissions which are now authorized by law to fix the compensation of their employes shall not be deemed to be county employes for the purposes of this section.

(3) In the case of officers compensated from fees, or partly from fees and partly by salary, the fiscal court shall fix the maximum compensation that any officer except the officers named in KRS 64.535 may receive from both sources. The fiscal court may also fix the number of deputies and assistants, and, the compensation thereof, and the maximum amount that the officer may expend each year for expenses of his office.

(4) In the case of county officers elected by popular vote and the county attorney, in the event the fiscal court provides him a salary, the monthly compensation of the officer and of his deputies and assistants shall be fixed by the fiscal court not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term but the compensation of his deputies or assistants may be reviewed and adjusted by the fiscal court not later than the first Monday in May of any successive year upon the written request of the officer. On or before August 1, 1966,

the fiscal court shall fix the salary provided herein for the county attorneys for the term commencing in January, 1966, notwithstanding any other provisions of this section which may be inconsistent herewith.

(5) Nothing in this section shall apply to property valuation administrators or their deputies, assistants and expenses, in any county, or to the circuit court clerk, county clerk, sheriff, jailer, and their deputies, assistants and expenses, in counties having a population of seventy-five thousand (75,000) or more.

(6) Justices of the peace serving on a fiscal court in any county, and county commissioners serving on a fiscal court in any county other than one (1) containing a city of the first, second, third or fourth class, shall be paid for their services, out of the county treasury, not to exceed the maximum compensation allowable under KRS 64.527. The fiscal court shall fix the amount to be received within the above limit, but no change of compensation shall be effective as to any member of a fiscal court during his term of office. The compensation of county commissioners serving on fiscal courts in counties containing a city of the first class shall not exceed nine thousand six hundred dollars ($9,600) per year, in counties containing cities of the second class it shall not exceed nine thousand dollars ($9,000) per year and in counties containing cities of the third or fourth class it shall not exceed twenty percent (20%) more than the annual compensation paid in the county for the calendar year immediately preceding 1974, and all of said annual salaries shall be payable monthly. Justices of the peace and county commissioners shall not receive any compensation for their services on the fiscal court, other than as provided by this section; nor shall they receive any compensation for serving on committees of the fiscal court. The fiscal court shall fix the amount to be received within the above limit, but no change of compen-

sation except as provided in KRS 64.285 shall be effective as to any member of a fiscal court during his term of office. (Enact. Acts 1950, ch. 123, § 9; 1956, ch. 144; 1958, ch. 126, § 2; 1962, ch. 214, § 1; 1964, ch. 109, § 3; 1966, ch. 15, § 2; 1966, ch. 255, § 75; 1968, ch. 152, § 33; 1970, ch. 203, § 1; 1972, ch. 30, § 1; 1972, ch. 203, § 5; 1972, ch. 358, § 1; 1974, ch. 60, § 2; 1974, ch. 254, § 4; 1976, ch. 306, § 1; 1976 (Ex. Sess.), ch. 17, § 20, effective January 1, 1978; 1976 (Ex. Sess.), ch. 14, § 40, effective January 2, 1978; 1978, ch. 196, § 1, effective June 17, 1978; 1978, ch. 384, § 131, effective June 17, 1978.)

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FISCAL COURTS

67.040. Fiscal Court—Members—Presiding Officer—Deadlock.—(1) The fiscal court of each county shall consist of the county judge/executive and the justices of the peace of the county; or of the county judge/executive and three (3) county commissioners elected under KRS 67.050 and 67.060.

(2) The county judge/executive shall preside, if present. A majority of the justices of the peace or commissioners shall elect one (1) of their number to preside during the absence or inability of the county judge/executive to preside. If any person fails to comply with a lawful order of the fiscal court, the circuit court, on application of the county judge/executive, may compel obedience by proceedings for contempt.

(3) When there is a tie vote in the fiscal court in the selection of any officer or employee to be selected by the fiscal court, and a deadlock results and continues for fifteen (15) days or longer, the county judge/executive shall cause to be entered upon the minutes of the fiscal court an order reciting the facts as to the deadlock, and the question upon which it has occurred and exists, and thereupon, the county judge/executive shall make such appointment. (1833, 1836, 1837: amend. Acts. 1942, ch. 173 §§ 1, 2; 1952, ch. 224, § 1; 1976 (Ex. Sess.), ch. 20, § 6, effective January 2, 1978; 1978, ch. 118, § 7, effective June 17, 1978; 1978, ch. 384, § 141, effective June 17, 1978.)

67.083. Additional Powers of Fiscal Courts.—(1) It is the purpose of this section to provide counties as units of general purpose local government with the necessary latitude and flexibility to provide and finance various governmental services within those functional areas specified in subsection (3) of this section, while the general assembly retains full authority to prescribe and limit by statute local governmental activities when it deems such action necessary.

(2) The fiscal court of any county is hereby authorized to levy all taxes not in conflict with the Constitution and statutes of this state now or hereafter enacted.

(3) The fiscal court shall have the power to carry out governmental functions necessary for the operation of the county. Except as otherwise provided by statute or the Kentucky Constitution, the fiscal court of any county may enact ordinances, issue regulations, levy taxes, issue bonds, appropriate funds and employ personnel in performance of the following public functions:

(a) Control of animals, and abatement of public nuisances;

(b) Regulation of public gatherings;

(c) Public sanitation and vector control;

(d) Provision of hospitals, ambulance service, programs for the health and welfare of the aging and juveniles, and other public health facilities and services;

(e) Provision of corrections facilities and services, and programs for the confinement, care and rehabilitation of juvenile law offenders;

(f) Provision of parks, nature preserves, swimming pools, recreation areas, libraries, museums and other recreational and cultural facilities and programs;

(g) Provision of cemeteries and memorials;

(h) Conservation, preservation and enhancement of natural resources including soils, water, air, vegetation and wildlife;

(i) Control of floods;

(j) Causing the repair or demolition of structures which present a hazard to public health, safety or morals or are otherwise inimical to the welfare of residents of the county; causing the redevelopment of housing and related commercial, industrial and service facilities in urban or rural areas; providing education and counseling services and technical assistance to present and future residents of publicly assisted housing;

(k) Planning, zoning and subdivision control according to the provisions of KRS Chapter 100;

(l) Adoption, by reference or in full, of technical codes governing new construction, renovation or maintenance of structures intended for human occupancy;

(m) Regulation of commerce for the protection and convenience of the public;

(n) Regulation of the sale of alcoholic beverages according to the provisions of KRS Chapters 241 through 244;

(o) Exclusive management of solid wastes by ordinance or contract or by both and disposition of abandoned vehicles;

(p) Provision of public buildings, including armories, necessary for the effective delivery of public services;

(q) Cooperation with other units of government and private agencies for the provision of public services, including but not limited to training, educational services and cooperative extension service programs;

(r) Provision of water and sewage and garbage disposal service but not gas or electricity; including management of onsite sewage disposal systems;

(s) Licensing or franchising of cable television;

(t) Provision of streets and roads, bridges, tunnels and related facilities, elimination of grade crossing, provision of parking facilities, enforcement of traffic and parking regulations;

(u) Provision of police and fire protection;

(v) Regulation of taxis, buses and other passenger vehicles for hire;

(w) Provision and operation of air, rail and bus terminals, port facilities, and public transportation systems;

(x) Promotion of economic development of the county, directly or in cooperation with public or private agencies, including the provision of access roads, land and buildings, and promotion of tourism and conventions;

(y) Preservation of historic structures.

(4) The county judge/executive is hereby authorized and empowered to exercise all of the executive powers pursuant to this section.

(5) A county acting under authority of this section may assume, own, possess and control assets, rights and liabilities related to the functions and services of the county.

(6) If a county is authorized to regulate an area which the state also regulates, the county government may regulate the area only by enacting ordinances which are consistent with state law or administrative regulation.

(a) If the state statute or administrative regulation prescribes a single standard of conduct, a county ordinance is consistent if it is identical to the state statute or administrative regulation.

(b) If the state statute or administrative regulation prescribes a minimal standard of conduct, a county ordinance is consistent if it establishes a standard which is the same as or more stringent than the state standard.

(c) A county government may adopt ordinances which incorporate by reference state statutes and administrative regulations in areas in which a county government is authorized to act.

(7) County ordinances which prescribe penalties for their violation shall be enforced throughout the entire area of the county unless:

(a) Otherwise provided by statute, or

(b) The legislative body of any city within the county has adopted an ordinance pertaining to the same subject matter which is the same as or more stringent than the standards that are set forth in the county ordinance. The fiscal court shall forward a copy of each ordinance which is to be enforced throughout the entire area of the county to the mayor or chairman of the board of trustees of each city in the county.

(8) The powers granted to counties by this section shall be in addition to all other powers granted to counties by other provisions of law. A permissive procedure authorized by this section shall not be deemed to be exclusive or to prohibit the exercise of other existing laws and laws which may hereafter be enacted but shall be an alternative or supplement thereto.

(9) Any agency of county government exercising authority pursuant to subsection (3) (y) of this section shall, prior to exercising such authority, obtain the voluntary written consent of the owner of the structure. Consent may be obtained only after advising the owner in writing of any advantages and disadvantages to the owner which are likely to result from the exercise of such authority. (Enact. Acts 1972, ch. 384, § 1; 1976 (Ex. Sess.), ch. 20, § 6, effective January 1, 1978; 1978. ch. 118, § 3, effective June 17, 1978; 1979 (Ex. Sess.), ch. 22, § 1, effective May 12 1979; 1980, ch. 149, § 3, effective July 15, 1980.)

121.055. Candidates prohibited from making expenditure, loan, promise agreement or contract as to action when elected, in consideration for vote.—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract. (Enact. Acts 1974, ch. 130, § 182; 1980, ch. 292, §3, effective July 15, 1980.)

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